Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-351 OF 1995
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
16 FEBRUARY 1998

Contract *— Formation — Concluded contract — Sale and purchase of land — Agent contracting on behalf of undisclosed principal to purchase land — Vendor accepted terms and conditions of sale — Vendor subsequently required disclosure of identity of principal — Whether principal was purchaser of the land — Whether vendor entitled to terminate contract — Whether there was concluded and binding contract between vendor and principal*

Civil Procedure *— Appeal — Fact, findings of — Interference by appellate court — Whether findings could be sustained and supported by evidence*

The appellant instructed Appraisal (M) Sdn Bhd ('Appraisal') to look for a piece of land ('the land') to be purchased by the appellant. It was the appellant's instruction to keep its identity strictly confidential regarding the purchase of the land. In September 1988, Appraisal confirmed with the respondent that it had found a purchaser for the land. In Appraisal's letter dated 4 October 1988 to the respondent, Appraisal sought confirmation from the respondent on the sale of the land. Appraisal then sent a letter dated 11 October 1988 containing the terms and conditions of the sale and purchase of the land to the respondent which were accepted and confirmed unconditionally on 14 October 1988 by the respondent. Subsequently, the respondent notified the solicitors instructed to prepare the draft of the sale and purchase agreement that it would only deal with a disclosed principal and purported to terminate and/or revoke the proposed sale of the land. The solicitors then informed the respondent that they were acting for Zodiac Development Sdn Bhd ('Zodiac') as the prospective purchaser. The appellant's solicitors then notified the respondent that the appellant was the purchaser of the land and that Zodiac was the appellant's proposed assignee.

The appellant claimed for specific performance of the contract contended by the appellant to be concluded and binding in the form of the letter dated 11 October 1988 written by Appraisal to the respondent. The trial judge found as a fact that the appellant was not the purchaser of the land and that there was no privity of contract at any time between the appellant and the respondent and dismissed the appellant's claim. The appellant appealed.

The appellant submitted that all the time the respondent knew that there was a principal and that Appraisal was contracting on behalf of the principal whose identity was not required by the respondent to be disclosed when it accepted the terms and conditions. In the circumstances, there was a concluded and binding contract between the appellant and the respondent. It was submitted that the judge had erred in law and fact and had failed to consider properly the several contemporaneous letters. It was further submited that the appellant was the purchaser of the land, and that no other party had come forward to claim to be the purchaser.

On the other hand, the respondent submitted that as on 14 October 1988, the appellant was not the purchaser of the land. It was argued that the appellant came into the picture after the respondent had terminated the proposed sale. The respondent submitted that the court should not disturb the findings of fact by the trial judge that the appellant was not the purchaser of the land referred to in the letters. It was contended that Zodiac was the purchaser in respect of the letter of 11 October 1988.

The principal issue for determination was whether the appellant was the purchaser of the land on 14 October 1988, when the respondent unconditionally confirmed acceptance of the terms and conditions set out in Appraisal's letter of 11 October 1988.

Held, allowing the appeal:

(1) It was clear that Appraisal in the letter of 11 October 1988 was contracting as an agent on behalf of its principal, ie the appellant who was unnamed then. At that time, there was no requirement by the respondent to reveal the name and the identity of the principal. Thus, in the letter dated 11 October 1988, the subject matter was the land, the vendor was the respondent, the purchaser was the unnamed principal of Appraisal. The respondent, despite knowing that the principal was unnamed, had on 14 October 1988 unconditionally accepted the price, and all the terms and conditions stated therein, thereby concluding a binding contract between the respondent as vendor and the appellant, who was the unnamed principal, as the purchaser. After the conclusion of the contract, it was not open to the respondent without proper justification to repudiate or terminate the contract or to vary it by introducing a new material term on the disclosure of identity in trying to renege upon the agreement (see pp 43H–I and 44A–B).

(2) It is clear from the authorities that the English Statute of Frauds 1677 has no application in West Malaysia. Even if that Statute applied to the present case, the requirements of the Statute had been complied with (see p 44C–D); *Basma v Weekes & Ors* [1950] AC 441 followed.

(3) The finding by the judge that Zodiac was the purchaser could not be right in the light of the letters dated 4 October 1988, the letter from Zodiac's own solicitors, and the letter from the appellant's solicitors. It was clear from these letters that the irresistible conclusion was that Zodiac was the proposed assignee or purchaser from the appellant, and not from the respondent. It appeared that in the mind of Appraisal there was no other purchaser except the appellant. It was dealing with the appellant as purchaser at all material times. Moreover, nobody from Zodiac came forward to claim to be the purchaser (see p 46B–D).

(4) The court, sitting as an appellate court, should be slow or reluctant to interfere with the findings of fact by the trial judge, unless those findings cannot be sustained and supported by the evidence. This appeal involved several material contemporaneous letters and oral evidence as to whether the appellant was the purchaser of the land. Those contemporaneous letters written before any dispute had arisen must be given better credence than the oral evidence, unless the totality of the evidence clearly showed otherwise. The court was satisfied that the judge had not taken a proper approach or given due consideration in evaluating the contemporaneous letters in the light of the totality of the evidence and also taking into account the fact that the managing director of the respondent was not called to give evidence. It was clear that the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties was that the purchaser of the land was the appellant (see pp 46G and 47C–F); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 followed.

(5) The contention that Appraisal had breached the Valuers, Appraisers and Estate Agents Rules 1986 for acting for both vendor and purchaser did not affect the conclusion of whether there was a binding contract or not. Even assuming that there was a breach committed by Appraisal, it would be subjected to a disciplinary action by the Board of Valuers, Appraisers and Estate Agents but would not affect the transaction in this appeal (see p 47G–I).

[Bahasa Malaysia summary

Perayu telah mengarahkan Appraisal (M) Sdn Bhd ('Appraisal') supaya mencari sebidang tanah ('tanah tersebut') untuk dibeli oleh perayu. Perayu telah memberi arahan supaya identitinya tetap kekal sulit mengenai belian tanah tersebut. Pada bulan September 1988, Appraisal mengesahkan dengan penentang bahawa ia telah menjumpai pembeli untuk tanah tersebut. Dalam surat Appraisal bertarikh

A 4 Oktober 1988 kepada penentang, Appraisal meminta pengesahan daripada penentang tentang jualan tanah tersebut. Appraisal kemudiannya menghantar sepucuk surat bertarikh 11 Oktober 1988 mengandungi terma dan syarat jualan dan belian tanah tersebut kepada penentang yang diterima dan disahkan tanpa syarat pada B 14 Oktober 1988 oleh penentang. Berikutnya, penentang memaklumkan kepada peguamcara yang diarah supaya menyediakan draf perjanjian jual beli bahawa ia hanya akan berurusan dengan prinsipal yang didedahkan dan kononnya menamatkan dan/atau membatalkan jualan tanah tersebut yang dicadangkan. Peguamcara kemudiannya memberitahu penentang bahawa mereka bertindak C untuk Zodiac Development Sdn Bhd ('Zodiac') sebagai bakal pembeli. Peguamcara perayu kemudiannya memaklumkan kepada penentang bahawa perayu adalah pembeli tanah tersebut dan bahawa Zodiac adalah bakal pemegang serahhak perayu.

Perayu menuntut pelaksanaan spesifik ke atas kontrak yang D dihujahkan oleh perayu telah disempurnakan dan mengikat dalam bentuk surat bertarikh 11 Oktober 1988 yang ditulis oleh Appraisal kepada penentang. Hakim perbicaraan mendapati sebagai satu fakta bahawa perayu bukanlah pembeli tanah tersebut dan bahawa tiada priviti kontrak pada bila-bila masa di antara perayu dan penentang E dan menolak tuntutan perayu. Perayu membuat rayuan.

Perayu berhujah bahawa pada semua masa penentang tahu bahawa adanya prinsipal dan bahawa Appraisal mengikat kontrak bagi pihak prinsipal yang identitinya tidak dikehendaki oleh penentang untuk didedahkan ketika ia menerima terma dan syarat. Dalam F keadaan begitu, terdapat kontrak yang sempurna dan mengikat di antara perayu dan penentang. Adalah dihujahkan bahawa hakim terkhilaf dari segi undang-undang dan fakta serta gagal untuk mengambil kira sewajarnya beberapa surat sezaman. Ia seterusnya dihujahkan bahawa perayu adalah pembeli tanah tersebut, dan bahawa tiada pihak lain telah tampil ke hadapan untuk mendakwa dirinya G sebagai pembeli.

Sebaliknya, penentang menghujahkan bahawa pada 14 Oktober 1988, perayu bukanlah pembeli tanah tersebut. Ia dihujahkan bahawa perayu terbabit selepas penentang telah menamatkan jualan yang dicadangkan. Penentang menghujahkan bahawa mahkamah tidak H patut mengganggu pendapat fakta oleh hakim perbicaraan bahawa perayu bukanlah pembeli tanah tersebut yang dirujuk dalam surat-surat itu. Ia dihujahkan bahawa Zodiac adalah pembeli berkenaan dengan surat bertarikh 11 Oktober 1988.

Isu utama untuk penentuan ialah sama ada perayu adalah pembeli I tanah tersebut pada 14 Oktober 1988, apabila penentang tanpa syarat mengesahkan penerimaan terma dan syarat yang dinyatakan dalam surat Appraisal bertarikh 11 Oktober 1988.

Diputuskan, membenarkan rayuan: A

(1) Adalah jelas bahawa Appraisal dalam surat bertarikh 11 Oktober 1988 mengikat kontrak sebagai ejen bagi pihak prinsipalnya, iaitu perayu yang tidak dinamakan ketika itu. Pada masa itu, tiada keperluan oleh penentang untuk mendedahkan nama dan identiti prinsipal. Justeru itu, dalam surat bertarikh 11 Oktober B 1988, perkara subjek adalah tanah tersebut, penjual adalah penentang, pembeli adalah prinsipal Appraisal yang tidak dinamakan. Meskipun penentang tahu prinsipal tidak dinamakan, pada 14 Oktober 1988 penentang telah menerima harga, dan kesemua terma dan syarat yang dinyatakan dalamnya tanpa syarat, dengan itu mencapai kontrak yang mengikat di antara penentang C sebagai penjual dan perayu, yang merupakan prinsipal yang tidak dinamakan, sebagai pembeli. Selepas penyempurnaan kontrak, ia tidak terbuka kepada penentang tanpa justifikasi yang wajar untuk menolak atau menamatkan kontrak atau untuk mengubahnya dengan memperkenalkan suatu terma material D yang baru tentang pendedahan identiti dalam percubaan untuk memungkiri perjanjian (lihat ms 43H–I dan 44A–B).

(2) Adalah jelas daripada autoriti-autoriti bahawa Statut Fraud Inggeris 1677 tidak terpakai di Semenanjung Malaysia. Sekalipun Statut tersebut terpakai kepada kes ini, keperluan-keperluan Statut E telah pun dipatuhi (lihat ms 44C–D); *Basma v Weekes & Ors* [1950] AC 441 diikut.

(3) Keputusan oleh hakim bahawa Zodiac adalah pembeli tidak mungkin betul memandangkan surat-surat bertarikh 4 Oktober 1988, surat daripada peguamcara Zodiac sendiri, dan surat daripada peguamcara perayu. Adalah nyata daripada surat-surat F ini bahawa kesimpulan yang tidak dapat dibendung adalah bahawa Zodiac merupakan pemegang serahhak atau pembeli yang dicadangkan daripada perayu, dan bukan daripada penentang. Ia kelihatan bahawa dalam minda Appraisal tiada pembeli lain melainkan perayu. Ia berurusan dengan perayu sebagai pembeli G pada semua masa material. Tambahan pula, tiada sesiapa dari Zodiac tampil ke hadapan untuk mendakwa dirinya sebagai pembeli (lihat ms 46B–D).

(4) Mahkamah, yang bersidang sebagai sebuah mahkamah rayuan, haruslah berwaspada atau enggan mengganggu keputusan oleh hakim perbicaraan, melainkan keputusan itu tidak boleh H dikekalkan atau disokong oleh keterangan. Rayuan ini melibatkan pelbagai surat sezaman yang material dan keterangan lisan tentang sama ada perayu adalah pembeli tanah tersebut. Surat-surat sezaman itu yang ditulis sebelum apa-apa pertikaian timbul mestilah diberikan kepercayaan yang lebih tinggi berbanding I dengan keterangan lisan, melainkan keseluruhan keterangan jelas menunjukkan sebaliknya. Mahkamah berpuas hati bahawa hakim tidak mengambil pendekatan yang betul atau pun memberikan

pertimbangan sewajarnya dalam menilai surat-surat sezaman memandangkan keseluruhan keterangan dan juga mengambil kira hakikat bahawa pengarah urusan penentang tidak dipanggil untuk memberi keterangan. Adalah jelas bahawa inferens yang tidak dapat dielakkan yang boleh dibuat daripada dokumen sezaman dan kelakuan pihak-pihak adalah bahawa pembeli tanah tersebut adalah perayu (lihat ms 46G dan 47C–F); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 diikut.

(5) Penghujahan bahawa Appraisal telah melanggar Kaedah-Kaedah Penilai, Pentaksir dan Ejen-Ejen Harta Tanah 1986 kerana bertindak untuk kedua-dua penjual dan pembeli tidak menjejaskan kesimpulan sama ada terdapat kontrak yang mengikat atau tidak. Sekalipun menganggap bahawa terdapat pelanggaran yang dilakukan oleh Appraisal, ia akan tertakluk kepada tindakan tatatertib oleh Lembaga Penilai, Pentaksir dan Ejen-Ejen Harta Tanah tetapi tidak akan menjejaskan transaksi dalam rayuan ini (lihat ms 47G–I).]

Notes

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2152–2212.

For cases on formation of contract, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 366–435.

Cases referred to

Basma v Weekes & Ors [1950] AC 441 (folld)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (folld)

Davies v Sweet [1962] 2 QB 300 (refd)

Fung Ping Shan & Anor v Tong Shun [1918] AC 403 (refd)

MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors [1986] 1 MLJ 170 (refd)

Potter v Duffield (1874) LR 18 Eq 4 (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 (refd)

Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41 (refd)

Legislation referred to

Contracts Act 1950 ss 183–186

Valuers, Appraisers and Estate Agents Rules 1986

Appeal from: Civil Suit No S6–22–242 of 1989 (High Court, Kuala Lumpur) A

Wong Kim Fatt (*Apparao Apana* and *Gan Huey Piin* with him) (*KC Yap Kamaludin & Partners*) for the appellant.

Cyrus Das (*Harcharan Singh* with him) (*Harcharan Hashimah & Co*) for the respondent. B

Mokhtar Sidin JCA (delivering the judgment of the court): This is an appeal against the decision of the learned trial judge dismissing the claim of the appellant for specific performance of a contract contended by the appellant to be concluded and binding in the form of a letter dated 11 October 1988 written by Appraisal (M) Sdn Bhd ('Appraisal') to the respondent (appeal record ('AR') p 196) relating to the sale and purchase of a piece of land known as Lot 129, Section 44, Town and District of Kuala Lumpur ('the said land') measuring in area 100,933 sq ft, at the price of RM55 per sq ft. The appellant claimed that it is the purchaser of the said land registered in the name of the respondent as proprietor. The learned judge found as a fact that the appellant was not the purchaser of the said land and that there was no privity of contract at any time between the appellant and the respondent. He accordingly dismissed the appellant's claim with costs, and hence the appellant brought this appeal. We unanimously allowed the appeal on 9 December 1997. We now give our reasons for doing so. C D E

The issue

The principal issue for determination is whether the appellant was the purchaser of the said land on 14 October 1988, when the respondent unconditionally confirmed acceptance of the terms and conditions set out in Appraisal's letter of 11 October 1988 which will be reproduced in the course of this judgment. F

The facts G

In order to understand the case fully, it is necessary to narrate the material facts and events. The following facts were agreed between the parties. The appellant instructed Appraisal, a company of valuers and estate agents, to look for a piece of land to be purchased by the appellant. The appellant was dealing directly with Mr Tan Loy Fatt (PW1), the managing director of Appraisal, in respect of the purchase. The respondent also utilized the services of Appraisal to secure a purchaser for the said land. The respondent dealt with Mr Foo Fang Lim (PW4) of Appraisal in regard to its intended sale of the said land. Neither the appellant nor the respondent knew the identity of each other at first. PW1 as the managing director of Appraisal was in communication with PW4, then a registered estate agent and an employee of Appraisal. H I

In determining whether the appellant was the purchaser of the said land, the material starting point is 17 August 1988 when by a letter of that date (AR p 191) the appellant instructed Appraisal to find a property of about 2 to 4½ acres in prime location in Kuala Lumpur, promising a 2% agency fee. This was also stated in the oral evidence of Miss Kheoh And Yeng (PW2) (see AR 54 pp 78–79). It is material to consider the three letters written by Appraisal to the respondent as well as other material documents in the light of the oral evidence given at the trial. These three letters are dated 13 September 1988 (AR p 193), 4 October 1988 (AR p 94) and 11 October 1988 (AR p 196). In the letter of 13 September 1988, written by PW4 on behalf of Appraisal and expressed to be subject to contract, Appraisal confirmed with the respondent that Appraisal had found a purchaser for the said land at the price of RM45 per sq ft. The respondent by its managing director made a counter offer on 30 September 1988 of RM55 per sq ft on the said land. On 3 October 1988, the appellant wrote (AR p 241) to Appraisal instructing it to keep the identity of the appellant strictly confidential regarding the purchase of the said land. It is pertinent to quote the letter which is as follows:

3 October 1988

Appraisal (M) Sdn Bhd

Attention: Mr LF Tan

... Lot 129 ...

Reference to our various conversation to the above, please be informed that we are agreeable to purchase the property on the following terms and conditions:

(1) The price of the land is RM55 per sq ft.

(2) That the property is of freehold title.

(3) That the purchase is together with vacant possession of the land.

(4) Payment of 10% of the purchase price will be made upon signing of a formal sale and purchase agreement.

(5) The balance of 90% of purchase price will be paid nine months after the sale and purchase agreement.

Kindly keep our identity strictly confidential for the time being.

The instruction on the confidentiality of the appellant's identity was also confirmed by the oral evidence of PW1 at AR p 61 and AR p 71, and PW2 at AR p 79. In Appraisal's letter dated 4 October 1988 (AR pp 194 or 244), written by PW4 to the respondent and expressed to be subject to contract, Appraisal sought confirmation from the respondent on, inter alia, the sale of the said land at RM55 per sq ft, with vacant possession, and that under item (5) above the balance of 90% of the purchase price was to be paid nine months after the execution of the sale and purchase agreement. Appraisal also sent a cheque for RM1,000 as earnest money

and the respondent confirmed acceptance at the foot of the letter at AR p 195 but amended and shortened the completion period from 'nine months' to 'six months' for payment of the balance of the purchase price under item (5).

Appraisal took the precaution of sending a copy of its letter of 4 October 1988 (AR pp 194 or 244) to its principal — the appellant — for confirmation under cover of its letter dated 5 October 1988 (AR p 243) written by PW1 on behalf of Appraisal, and PW2 as director of the appellant accepted it on 7 October 1988 in accordance with the terms stated in Appraisal's letter of 4 October 1988 where at the foot of the letter it was written as follows:

> 5 October 1988
>
> Miss Kheoh And Yeng
>
> Purchase of Lot 129 ...
>
> We attach herewith a copy of our letter dated 4 October 1988 containing the terms as agreed upon by the landowner, M/s Wong Siew Choong Sdn Bhd.
>
> Please note the landowner's amendment on item (5).
>
> Kindly confirm your acceptance by signing and returning the duplicate copies of our letter of 4 October and this letter.
>
> Yours faithfully
> Appraisal (M) Sdn Bhd
>
> Sgd
> LF Tan
> Managing Director
>
> TFL/ml
>
> Anvest Corp Sdn Bhd
>
> Acceptance
>
> Sgd [Kheoh]
> Authorized Signature
>
> Authorized Signature
> Director
> Name & Designation
> Date: 7 October 1988

This acceptance was also confirmed by the oral evidence of PW1 at AR p 56 and PW2 at AR p 80.

The crucial letter is the third letter which is dated 11 October 1988 (AR p 196), written by PW4 on behalf of Appraisal to the respondent as a follow-up of PW2's above confirmation on Appraisal's letter dated 5 October 1988. The terms and conditions stated in the letter of 11 October 1988 (AR p 196) were accepted and confirmed

A unconditionally on 11 October 1988 on behalf of the respondent by Mr Wong Kok Suan, its managing director. Again this letter merits full reproduction which is as follows:

Appraisal (M) Sdn Bhd

B Chartered Surveyors & Registered Valuers
Lot 207, 20th Floor, Menara Maybank, No 100,
Jalan Tun Perak, 50050 Kuala Lumpur. Telephone: 2322022

Private & Confidential
11 October 1988
C M/s Wong Siew Choong Sdn Bhd
c/o No 3 Jalan Yap Kwan Seng
50450 Kuala Lumpur.
Attn: Mr Wong Kok Suan

Dear Sirs,

D

Proposed sale of property held under
Lot No 129, Section 44, Town and District
of Kuala Lumpur (100,934 sq ft)

We are pleased to inform you that the purchaser has confirmed to purchase
E the abovementioned land. The terms and conditions, as agreed, are as follows:

(1) the price is at RM55 per sq ft;

(2) the property has a freehold title;

(3) you are able to give vacant possession of the property;

F (4) 10% of the price will be paid on signing of the sale and purchase agreement; and

(5) the balance 90% to be paid six months after the signing of the sale and purchase agreement.

The purchaser's solicitors are:

G Mr Choong Pee Choy of
M/s Choong & Co
Room 805/807, 8th Floor Lee Wah Bank Building
Medan Pasar, 50050 Kuala Lumpur
Tel: 2384682/2320858

H Kindly confirm the abovementioned terms and conditions by signing and returning the duplicate of this letter.

Yours faithfully
Appraisal (M) Sdn Bhd

I

Sgd
Foo Fang Lim
Registered estate agent

The abovementioned terms and conditions are confirmed herewith.

Wong Siew Choong Sdn Bhd
Authorized signature

Sgd
Managing Director
Name:
Date: 14 October 1988

By a letter dated 18 October 1988 (AR p 192) from M/s Michael Chen & Lee, solicitors for the respondent, addressed to M/s Choong & Co, the respondent amended and introduced a new term, ie the sale is without vacant possession. The reply to that letter from M/s Choong & Co was dated 20 October whereby it was stated that they had no instructions to prepare the draft of the sale and purchase agreement. It went on to say that the draft was to be prepared by M/s Raja Eleena Siew Ang & Tan. By a letter dated 21 October 1988 (AR p 201), M/s Raja Eleena Siew Ang & Tan notified M/s Michael Chen & Lee that they were acting 'for the prospective purchaser' without naming the purchaser. The reply from M/s Michael Chen & Lee was dated 20 October 1988 (AR p 202) where it was stated that it would only deal with a disclosed principal and purported to terminate and/or revoke the proposed sale of the said land. Zodiac Development Sdn Bhd came into the picture in a letter dated 29 October 1988 from M/s Raja Eleena Siew Ang & Tan to M/s Michael Chen & Lee where the latter was informed by the former that the former was acting for Zodiac as the prospective purchaser. By a letter dated 22 November 1988 (AR p 215), M/s Yusuf Lee Pathma & Marbeck wrote to M/s Raja Eleena Siew Ang & Tan, stating that they never acted for Zodiac but for 'Anvest Corporation Sdn Bhd, the principal on the purchase of the said land'. In that letter, M/s Yusuf Lee Pathma & Marbeck mentioned an assignment to Zodiac and stated as follows:

> We refer to your agreement to assign and are instructed that our clients are quite agreeable to the terms thereof provided that your clients agree to grant an appropriate power of attorney to our clients in the form and substance attached hereto and make to our clients equivalent to the first ten per centum (10%) of the purchase price of the said land within *seven days* from the date hereof for onward transmission to the seller's solicitors.

The reply to that letter from M/s Raja Eleena Siew Ang & Tan dated 30 November 1988 (AR p 217) is significant to note that M/s Raja Eleena Siew Ang & Tan accepted that Zodiac was purchasing the land from the appellant. The contents, inter alia, of that letter are as follows:

30 November 1988

M/s Yusuf Lee Pathma & Marbeck

Re: ... Lot 129 ...

We write to put on record the following events:

(a) *We are acting for M/s Zodiac Development Sdn Bhd.*

(b) Our clients were approached by your clients wherein our clients were informed by your clients that they have been granted an option to purchase the above property. *Our clients were further informed that your clients are agreeable to assign the option to purchase to our clients* subject to

A the payment of a sum of money to your clients as a consideration for the assignment. (Emphasis added.)

That letter ended as follows:

> Based on the above events we have now been instructed to inform that our clients are still interested in the property and are willing to enter into *fresh negotiations with your clients for the purchase of the same from your clients* only after your clients have purchased the above property from the vendor. (Emphasis added.)

By a letter dated 2 December 1988 (AR p 219) M/s Yusuf Lee Pathma & Marbeck informed M/s Michael Chen & Lee of the assignment. The contents, inter alia, of that letter are as follows:

> 2 December 1988
>
> Messrs Michael Chen & Lee
> Advocates & Solicitors
> 8th Floor, Bangunan Bangkok Bank BY HAND
> 105, Jalan Bandar
> 50000 Kuala Lumpur
>
> Dear Sirs,
>
> Re: Grant No 6853 Lot 129, Section 44, Town and District of Kuala Lumpur
>
> We act for Anvest Corporation Sdn Bhd, the purchaser of the land above-captioned and are instructed that you are acting for the seller thereof.
>
> We are further instructed that *Zodiac Development Sdn Bhd was our clients' proposed assignee* of our clients' interests contained in the written agreement constituted by several letters between your clients and M/s Appraisal (M) Sdn Bhd and between our clients and M/s Appraisal (M) Sdn Bhd.
>
> Kindly be informed that *our clients' said assignee* has agreed to cease communicating with your clients or you as solicitors and our clients will now proceed to pursue with the agreement aforesaid strictly upon the terms agreed therein. (Emphasis added.)

Mr Wong Kim Fatt, learned counsel for the appellant, submitted that the terms and conditions of the sale and purchase of the said land as stated in Appraisal's letter of 11 October 1988 had been unconditionally accepted by the respondent on 14 October 1988. He submitted that all the time the respondent knew that there was a principal and that Appraisal was contracting on behalf of the principal whose identity was not required by the respondent to be disclosed when it accepted the terms and conditions. In the circumstances, there was a concluded and binding contract between the appellant and the respondent. Mr Wong referred us to the several contemporaneous letters, oral evidence and the authorities which we will revert to later on. He submitted that the learned judge had erred in law and fact and had failed to consider properly the letter dated 17 August 1988 appointing Appraisal as agent, the letter of 5 October 1988 (AR

p 243) confirmed by PW2 on 7 October 1988, the oral evidence of PW1, PW2 and PW3 (Lee Lim Huat) relating to the secrecy of the appellant's identity and the on-sale of the said land to Zodiac as the proposed assignee of the appellant. He further submited that the appellant is the purchaser of the said land, and that no other party had come forward to claim to be the purchaser.

On the other hand, Dr Cyrus Das, learned counsel for the respondent, submitted that as on 14 October 1988, the appellant was not the purchaser of the said land. He argued that the appellant came into the picture after the respondent had terminated the proposed sale. He submitted that we should not disturb the findings of fact by the learned trial judge that the appellant was not the purchaser of the said land referred to in the three letters stated above. The learned judge had held that there was no privity of contract between the appellant and the respondent. Dr Das relied heavily on the oral evidence of PW4, a former employee of Appraisal. Learned counsel contended that Zodiac was the purchaser in respect of the letter of 11 October 1988. He submitted that PW1 had been hawking the said land and had breached the Valuers, Appraisers and Estate Agents Rules of 1986 prohibiting a firm of estate agents from acting for both vendor and purchaser except with their knowledge and consent.

The learned judge in his judgment (at p 4) said:

> In law, the identity of vendor and purchaser is pivotal as to whether there exists any enforceable contract. It is a question of privity of contract. At common law, the mere use of the term 'vendor' or 'purchaser' on a document purporting to evidence a contract is insufficient to make it legally binding.

He then cited the sole authority in his judgment, ie the old English case of *Potter v Duffield* (1874) LR 18 Eq 4, a decision of Jessel MR involving the English Statute of Frauds 1677, which has no application to the present case. However, with the greatest respect to the learned judge, we find that he did not discuss the law of agency and also he did not decide if there was a concluded and binding contract arising out of the unconditional acceptance by the respondent of the terms and conditions stated in the letter of 11 October 1988. We find it relevant to discuss briefly the law in respect of these before determining the question whether the appellant was the purchaser of the said land.

Agents and principals

The law relating to agents and principals and their relations to third parties is well settled and is codified under ss 183 to 186 of our Contracts Act 1950. In 1 *Halsbury's Laws of England* (4th Ed) at para 854, there appears the following passage:

> *Identity of principal not disclosed.* Where an agent in making a contract discloses the existence, but not the name, of a principal on whose behalf he is acting, he is not made liable by the mere fact of not disclosing the name ... .

A The general rule is stated in para 31–53 of *Chitty on Contracts* Vol 2 (27th Ed, 1994), which is as follows:

> The general rule is that a principal is bound by, and entitled to the benefit of the contract of his agent made on his behalf within the scope of such agent's actual authority. This is so whether the agent at the time of acting named or identified his principal ('named principal') or merely indicated B that he was acting for a principal but did not identify him ('unnamed principal') ... .

In *Bowstead on Agency* (15th Ed) at p 312, there is the following general statement:

C > An undisclosed principal may sue or be sued on any contract made on his behalf, or in respect of money paid or received on his behalf by his agent acting within the scope of his actual authority.

George J (as he then was) in the case of *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170 at p 171 said:

D > It is not uncommon that in mercantile transactions one party acts as agent for an undisclosed principal. The law recognizes that and the rights of the parties to a contract made by an agent of an undisclosed principal have been codified in ss 183 to 186 of the Contracts Act. Section 184 goes to the extent of providing that the undisclosed principal may require the performance of the contract even though the other party to the contract E neither knew or had reason to suspect that the person he had dealt with was in fact an agent.

In Beale, Bishop and Furmston's *Contract Cases and Materials* (Butterworths 1990) at p 800 stated as follows:

F > There is nothing to stop an agent contracting explicity on someone else's behalf without naming his principal. The third party may not be worried about who the principal is and if it does concern him he can of course refuse to contract without the identity of the principal being revealed.

Whether there is a concluded and binding contract

G We now return to the issue in the present appeal whether there is a concluded and binding contract. First, we return to the letter dated 11 October 1988. The purchaser in the first paragraph appears to us to be the same purchaser in the previous two letters dated 4 October 1988 and 13 September 1988. It is clear to us that Appraisal in the letter of H 11 October 1988 was contracting as an agent on behalf of its principal, ie the appellant who was unnamed then. At that time, there was no requirement by the respondent to reveal the name and the identity of the principal when responding to those letters. Thus in the letter dated 11 October 1988 reproduced above, the subject matter was the said land, I the vendor was the respondent, the purchaser was the unnamed principal of Appraisal. The respondent despite knowing that the principal was unnamed had on 14 October 1988 unconditionally accepted the price, and all the terms and conditions stated therein, thereby in our view concluding

a binding contract between the respondent as vendor and the appellant, who was the unnamed principal as the purchaser. We are of the view that after the conclusion of the contract, it was not open to the respondent without proper justification to repudiate or terminate the contract or to vary it by introducing a new material term on the disclosure of identity, or non-vacant possession in trying to renege upon the agreement. Appraisal's solicitors' letter dated 14 November 1988 (AR p 212) to the respondent's solicitors had maintained that 'at all times there was and is a firm agreement by your clients to sell the land above-captioned as further evidenced by your clients' acceptance of payment'. Appraisal's solicitors also sent back the cheque for RM1,000 which was returned by the respondent's solicitors.

In our view, it is clear from the authorities that the English Statute of Frauds has no application in West Malaysia (see *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41). Even if that Statute applies to the present case, the requirements of the Statute have been complied with. This can be seen from the case of *Basma v Weekes & Ors* [1950] AC 441. In that case, the purchaser (Wright) named in the agreement was a solicitor and it was proved by oral evidence that he was, to the knowledge of the respondents (vendors), acting in the matter as agent for the appellant (Basma), but the agreement, as in the present appeal before us, did not name the appellant as purchaser. In delivering the judgment of the Judicial Committee, Lord Reid said at p 454:

> ... Their Lordships are satisfied that in the present case the terms of the agreement of November 29 are such that Wright was contractually bound, and therefore the agreement satisfies the Statute of Frauds. So Wright could have sued on the agreement, and if he could sue, so can his principal, the appellant.

The decision of *Basma v Weekes* was followed by the English Court of Appeal in *Davies v Sweet* [1962] 2 QB 300.

As PW1 was under strict instruction by PW2 to keep the identity of the appellant confidential, it is not surprising that PW4 did not initially hear of the appellant from PW1. The learned judge was of the view that during the period 13 September 1988 to 11 October 1988, the purchasers were initially Ray Cheah of IGB and later Zodiac. The learned judge had relied virtually or substantially on the oral evidence of PW4. The learned judge at p 8 of his judgment said:

> Mr Foo goes on to say that when the letter (exh P1 p 26) dated 13 September 1988 was written setting out the initial terms of sale, 'the purchaser' referred to there was Ray Cheah of IGB. Mr Foo then says that a sum of RM1,000, a sort of booking fee, was paid to the defendant on behalf of Ray Cheah. Ray Cheah changed his mind about the purchase. Then Zodiac came into the picture. According to Mr Foo, Zodiac was brought in by Mr Tan (PW1).

Here PW4 clearly cannot be right when he said in oral evidence that the sum of RM1,000 was paid to the respondent on behalf of Ray Cheah, for his oral evidence is contradicted by the contemporaneous letter dated

A 4 October 1988 (AR p 242) written by PW1 for Appraisal to PW2 of the appellant which is as follows:

> 4 October 1988
>
> Miss Kheoh And Yeng
>
> B Dear Madam,
>
> Purchase of Lot 129, Section 44,
> Town and District of Kuala Lumpur
> (100,934 sq ft approximately)
>
> We attach herewith a copy of our letter dated 4 October 1988 (addressed to
> C the landowner) which is self-explanatory, for your attention.
>
> As instructed by you, we have forwarded your payment of RM1,000 to the landowner and did not reveal the identity of the purchaser.

We are of the view that the learned judge had overlooked this important letter. The inaccurate recollection of PW4, who left the employment of
D Appraisal in 1990, was understandable as he was testifying in 1995.

We note from the appeal record that the appellant had entered a private caveat against the said land (AR pp 246–249) on or about 22 November 1988. Paragraph 2 of the supporting statutory declaration dated 19 November 1988 of Miss Kheoh (PW2) reads as follows:

E

> That by a purchase agreement on or about *14 October 1988* made with Wong Siew Choong Ltd (hereinafter called 'the vendor'), we agreed to purchase and the vendor agreed to sell the piece of land held under Grant 6853 Lot 129 Section 44 District of Wilayah Persekutuan for the consideration and upon the terms and conditions contained in the said
> F purchase agreement. (Emphasis added)

Subsequently, on or about 12 December 1988 (AR pp 220–223), IGB Corp Bhd also entered a private caveat against the said land. It is clear to us that in para 2 of the supporting declaration, it states that IGB Corporation Bhd agreed to buy the said land on *9 December 1988* which was later than
G the date of the concluded contract between Appraisal and the respondent. This appears to escape the notice of the learned judge. As such, he could not be right when he stated his finding that during the period of the said letter, ie 13 September 1988 to 11 October 1988, the 'purchasers were initially Ray Cheah of IGB, and later Zodiac'. By this declaration, IGB entered the scene only on 9 December 1988, well after 11 or 14 October
H 1988. For clarity, we find it necessary to reproduce paras 1 and 2 of the statutory declaration dated 6 December 1988 of Goh Nan Kioh (AR p 223) as follows:

> (1) I am a director of IGB Corporation Bhd.
>
> (2) By an agreement in writing dated *9 December 1988* and made between
> I ourselves and Wong Siew Choong Sdn Bhd (hereinafter called 'the vendor') we agreed to buy and the vendor agreed to sell that piece of land held under Geran 6853 for Lot No 129, Section 44, in the Town

> of Kuala Lumpur for the consideration and upon the terms therein contained.

According to the oral evidence of PW4, Zodiac was the purchaser in the letter of 11 October 1988. The brief finding by the learned judge that Zodiac was the purchaser cannot be right in the light of the letters dated 4 October 1988 (AR p 242) and 5 October 1988 (AR p 243) by Appraisal to PW2, the letter dated 22 November 1988 from the appellant's solicitors, the letter dated 30 November 1988 from Zodiac's own solicitors (which was referred earlier), and the reply dated 2 December 1988 from the appellant's solicitors. It is clear that from these letters, we are of the opinion that the irresistible conclusion is that Zodiac was the proposed assignee or purchaser from the appellant, and not from the respondent. It appears to us that in the mind of PW1 there was no other purchaser except the appellant. He was dealing with the appellant as purchaser at all material times. Nobody from Zodiac came forward to claim to be the purchaser. This is unlike the case of *Fung Ping Shan & Anor v Tong Shun* [1918] AC 403, in which the uncle and the nephew had names which spelt the same in English as Tong Shun but which differed when written in Chinese characters. In that case, it is to be noted that the uncle and the nephew each claimed that he was the person named as the purchaser in the indenture dated 17 September 1909. In the present appeal before us, the evidence of PW1, PW2 and PW3 further shows that Zodiac was to be the purchaser from the appellant in an on-sale transaction or back to back transaction. Considering the business of PW1 as an estate agent, we do not think there is anything wrong in his conduct in trying to find the best buyer in an on-sale transaction. There appears to be some initial confusion on which solicitors were acting for which parties, but in our opinion, the confusion was of no material significance whatsoever and does not affect the validity of the concluded contract.

During the trial, the name of another company surfaced and that is the name of Gambang Development Sdn Bhd which appears to be PW2's RM2 shell company. We are of the opinion that nothing significant came out of it to merit our consideration.

We are fully aware that we, sitting as an appellate court, should be slow or reluctant to interfere with the findings of fact by the learned trial judge, unless those findings cannot be sustained and supported by the evidence. In *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113, the Supreme Court then for reasons stated therein refused to interfere with the findings of fact by the trial judge. However, in *Sivalingam all Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, the Court of Appeal interfered with the findings of fact by the trial judge as he had not adopted the correct approach to the evaluation of the evidence. In a more recent case, the Federal Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 also interfered with the findings of fact by the trial judge. In delivering the judgment of the Federal Court, Mohamed Dzaiddin FCJ at p 531 said:

A In the light of the above matters, in our view, the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties gathered from the letters referred to above was that there was no question of the agent being entitled to the incentive bonus both as a PSA and a GSA. In arriving at our conclusions, we have no doubt differed from the learned judge. However, since the credibility of the agent's B witnesses is not the main issue, we are justified in coming to a different conclusion because upon a review of the evidence as a whole, we find the learned judge had misdirected herself in failing to give due considerations to the contemporaneous documents in assessing the probabilities of the case. Had she done so, the balance would tilt in favour of the appellant, China Airlines.

C The appeal before us involves several material contemporaneous letters and oral evidence as to whether the appellant is the purchaser of the said land. We are of the view that those contemporaneous letters written before any dispute had arisen must be given better credence than the oral evidence, unless the totality of the evidence clearly shows otherwise. We are satisfied D that the learned judge had not taken a proper approach or given due consideration in evaluating the contemporaneous letters above, ie the letters of 17 August 1988, 3 September 1988, 4 October 1988 (AR pp 196 and 242), 5 October 1988, 11 October 1988, 22 November 1988, 30 November 1988 (by Zodiac's own solicitors at AR p 217) in the light of the totality of the evidence and also taking into account the fact that E Mr Wong Kok Suan, the managing director of the respondent, was not called to give evidence. We are of the view that the learned judge had not given due consideration to those letters. We are satisfied that the irresistible conclusion, or, to use the words of Mohamed Dzaiddin FCJ quoted above, 'the inescapable inference which could be drawn from the contemporaneous F documents and the conduct of the parties', is that the purchaser of the said land was the appellant, Anvest Corporation Sdn Bhd.

Breach of the rules

There is one other point raised by Dr Das before us and in the court G below, ie PW1 had breached the Valuers, Appraisers and Estate Agents Rules 1986 which in our view does not affect the conclusion of whether there is a binding contract or not. The only witness called by the respondent was one Miss Mahaletchumi, the registrar of the Board of Valuers, Appraisers and Estate Agents. She gave evidence as to the Rules of Board. H She admitted that she had no personal knowledge of the transactions between the parties. As such, she would not be able to know whether PW1 had actually breached the rules. Even assuming that there was a breach being committed by PW1, he would be subjected to a disciplinary action by the Board but not to affect the transaction in this appeal. We are not sitting here to inquire into the complaints against PW1 but to decide on I the transaction between the appellant represented by PW1 and the respondent.

Conclusion

For the reasons we have stated, we allowed the appeal of the appellant with costs here and below, and set aside the order of the learned judge. The deposit is to be refunded to the appellant. We directed that this case be remitted to the High Court regarding the proper order to be made for the completion of the contract between the appellant (Anvest Corporation Sdn Bhd) and the respondent (Wong Siew Choong Sdn Bhd) as embodied in the letter dated 11 October 1988 (AR p 196) written by Appraisal to the respondent and confirmed by the respondent.

Appeal allowed.

Reported by Jafisah Jaafar